DOCKET FILE COPY **ORIGINAL**

RECEIVED

APR 1 H 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requii-eincnts Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Nuniber Portability, and Universal Service Support Mechanisms	)	CC Docket No. 98-171
	)	
Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Aniericans with Disabilities Act of 1990	)	CC Docket No. 90-571
	)	
Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size	)	CC Docket No. 92-237 NSD File No. L-00-72
	)	
Number Resource Optimization	)	CC Docket No. 99-200
	)	
Telephone Number Portability	)	CC Docket No. 95-116
	)	
Truth-in-Billing and Billing Format	)	CC Docket No. 98-170

REPLY COMMENTS OF AOL TIME WARNER JNC.

AOL Time Warner Inc., by its counsel, files these Reply Comments in the above-captioned rulemaking proceeding regarding reform of the methodology used to determine universal service contributions.[1] **At** the outset, the Commission should ensure that the universal service contribution methodology does not unduly impact lnternet and high capacity services. Thus, while the Commission has stated it intends to classify wireline broadband services for

[1] *In the Matter of Federal-State Joint Board on Universal Service,* Report and Order and Second Further Notice of Proposed Rulemaking, CC Docket No. 96-45, el al., FCC 02-329 (rel. Dec. 13, 2002) ("*Second Further Notice").*

universal scrvice purposes in CC Docket No. 02-33' bcfore considering whether and how connections that underlie broadband Internet acccss might be assessed under a connections-based contribution approach. the Conimission should only finalize a new contribution methodology when it understands how it will impact the growth and usage of Internet and high capacity services. The Commission should also reject suggcstions that the contribution base be expanded to include Internet Sci-vice Providers ("ISPs"); such a step would be contrary to the express provisions of Section 254 of tlic Telecommunications Act, poor policy and would impose unwarranted additional costs on the use of Internet access services by consumers. Finally, the Commission should express]), maintain its current limitations on the ability of carriers to pass-through amounts in excess of their contributions to customers

1. THE UNIVERSAL SERVICE CONTRIBUTION METHODOLOGY SHOULD NOT UNDULY IMPACT INTERNET AND HIGH CAPACITY SERVICES

Even though the Commission has staled that it will determine the regulatory classification of wireline broadband services bcfore it considers how such services might be assessed for universal service contribution purposes under a conncctions-based approach[3], the Commission must consider whether and how implementation of any of the proposals presented in the *Second Further Notice* would impact Internet and high capacity services, so as to preserve important incentives for innovative new services and investment in more efficient infrastructure. AOL Time Warner purchases a varicty of telecommunications and telecommunications services in ordcr to bring its scrvices and content to consuiners. **As** a large customer of such services, AOL Time Warner contributes indirectly to univei-sal service through pass-throughs of universal

---

[2] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002) ("*Wireline Broadband NPRM*").

[1] *Second Further Notice* **ai** ¶ 76.

service contribution charges. Increases in these pass-through amounts – currently over 9% – will ultimately impact the consumers of AOL Time Warner's products and services, as production costs increase and/or prices are raised in turn. Thus, AOL Time Warner encourages the Commission to avoid any inadvertent adverse impacts on the growth and development of Internet and high capacity services by addressing the following concerns regarding the proposed contribution methodologies.

Definition of "Connections." The Commission proposes to define "connections" as facilities that provide end-users with access to an interstate public network, regardless of whether the connection is circuit-switched, packet-switched, wireline or wireless.[4] As AOL Time Warner has explained previously, the Commission should not require more than one connection per facility regardless of how many services are offered over that facility.[5] For example, customers should not be assessed for the local loop for voice and again for DSL or any other service that may be offered over the loop, as it would be both counterproductive and unfair to charge customers two or more times for the same loop. A line carrying both voice and DSL services does not establish two separate points of access to a public network. Most importantly, if the Commission were to impose an additional assessment on each derived service over the same facility, it could create a perverse disincentive to develop new services as well as needlessly complicate the connections-based methodology as new services are deployed, counter to the laudable goal of adopting a methodology that is fair, reasonable and readily understood by consumers.[6]

[4] *Id.*

[5] Comments of AOL Time Warner Filed April 22, 2002 at 9.

[6] *Federal State Board on Universal Service*, Further Notice of Proposed Rulemaking and Report and Order, 17 FCC Rcd 3752 (2002) at ¶ 8.

Likewise, the Commission should make clcar that inleimediate telecommunications facilities, such as those used for modcm aggregation services, should not be defined as **a** connection.[7] For example, some carriers pi-ovide a service that aggregates dial-up Internet traffic at modcm ports and delivers that traffic, to an ISP via high capacity facilities. Neither the modem ports nor the facilities connecting the ports should be defined as a connection. At most, **a** connection should only include tlie telephone line the consumer uses to access the ISP and the high capacity facility used by the ISP to connect to the public switched telephone network.

Capacity Tiers. Tlic FCC should also act to avoid skewing prices and creating inefficiencies for customers *of* high capacily scrvices. **All** of the connections-based proposals would assess connections at varying amounts based on their classification into different capacity tiers.[8] AOL Time Warner shares the concern of several parties that the Commission's proposed capacity ticrs, particularly for the highest capacity services, shift a greater contribution burden on high capacity business customers and could increase costs for high speed circuits, thereby encouraging some customers to purchase multiple lower speed circuits.' For example, dial-up ISPs often utilize T1 lines to provide services. Under tlie Commission's proposed capacity tiers, a TI circuit would be assessed sixteen tiines the Tier 1 rate while three 512 kbps circuits would only be asscssed three times the Tier 1 rate.[10] Thus, it could be more economical for customers to purchase a greater number of lower capacity circuits assuming, as is likely, that the carrier passes through fully its univei-sal service contribution charges. As a result, the tier structure

' Comments of Sprint filed Fcbruary 28, 2003 **at** 16.

[8] *Second Further Notice* at ¶ 81.

[Y] *See* **e** *g*., Comments of Sprint supra, **at** 1 1, Comments of WorldCom filed February **28,** 2003 at 35, Comments of Ad Hoc hlrd Fcbruary 28, 2003 at 11 and Comments of California PUC filed February 28 **at** 17. The Commission added a fourth tier for thc highest bandwidth connections to the capacity tiers originally proposed by CoSUS. *Second Further Notice* at ¶ 82.

[m] *See* Comments of Sprint supra, at 11 and *Second Further Notice* at ¶ **82**

could irrationally distort carrier pricing practices as well as customer purchasing decisions and encourage uneconomic or inefficient choices simply to minimize universal service costs, Reducing the assessments for the highest capacity ticrs will minimize potential market distortions.

II. THE FCC MAY NOT EXPAND THE CONTRIBUTION BASE BEYOND THE LIMITS ESTABLISHED IN THE 1996 ACT

Several commenting parties urge the Commission to broaden the contribution base to include ISPs, IP lelcphony pro! idcrs, and providers of broadband Jnternet access services on rhe grounds such action will promote a sustainable universal service fund.[11] The Commission must reject these recommendations as contrary to the 1996 Act and sound policy.

As an initial matter, the FCC has made clcar that this proceeding is intended to address ihe contribution mechanism for universal service among *recognized* providers of telecommunications and telecommunications services as well as carrier pass-throughs of universal service contribution charges to customers.[12] Indeed, the Commission specifically states that it is not proposing to assess directly ISPs, as originally proposed by SBC and BellSouth.[13] As for *IP telephony services*, the FCC has also made clear that proper regulatory classification will be based on a case-by-case determination.[14] Pursuant to Section 254(d) of the Telecommunications Act, contributors lo universal scrvice are specifically limited to interstate telecommunications carriers and other telecommunications providers. As such, unless and until

---

[11] *See e.g.*, Comments of Qwest filed February 28, 2003 at 2, Comnients of SBC/BellSouth filed February 28, 2003 at 6. Comments of NTCA filed February 28, 2003 at 3, Comments of USTA filed February 28, 2003 at 10, Comments of Western Alliance filed February 28, 2003 at 15. Comments of NRTA/OPASTCO filed February 28, 2003 at 12, Comments of NASUCA filed February 28, 2003 at 7 and Comments of Michigan PSC tiled February 28, 2003 at 7.

[12] As noted, the FCC has stated that it will address broadband Internet access in the *Wireline Broadband NPRM.*

[13] *Second Further Notice* at fn. 181

[14] *Federal-State Joint Board on Universal* Service, Report to Concress, 13 FCC Rcd 11501 (1998) at ¶¶90-91.

the FCC alters this approach, contributions will apply to IP telephony services only as the FCC reaches a specific decision in a particular instance.

Most importantly, as AOL Time Warner consistently has pointed out, it is well settled that ISPs, by virtue of their provision of information services, are neither carriers nor providers of telecommunications and therefore, pursuant to statute, cannot be required to contribute directly to universal service.[15] Notably, the Commission repeatedly has found that ISPs and their customers pay fully for the telecommunications services they use and are not getting a "free-ride" for use of the public switched telephone network, as some parties assert.[16] ISPs contribute significant amounts indirectly as high volume purchasers of telecommunications from incumbent and competitive local exchange carriers, interexchange carriers and other providers in the form of pass-through charges and rates that reflect universal service contributions.[17] Carriers are fully compensated for any costs incurred in providing telecommunications services to ISPs. Thus, there is no legitimate policy basis to justify including ISPs in the contribution base for universal service in contravention of the statute

Indeed, there is no record evidence to suggest that including new entities in the contribution base will have any measurable impact on the burgeoning size of the universal service fund or that contributions by additional entities would reduce or check the growth of the fund itself.[18] AOL Time Warner shares the concern of many carriers and customers that the

---

[15] *Id.* at ¶¶ 32, 66-72. *See also* Reply Comments of AOL Time Warner filed May 13, 2002

[16] *See e.g.*, *Comments* of Western Alliance *supra*, at 15-17, *See also Report in Response to Senate Bill 1768 and Conference Report on H.R. 3579*, Report to Congress, 13 FCC Rcd 11810 (1998) at ¶ *22* (stating that "information service providers, which are not obligated by statute to contribute, will *make* no direct contribution; information service providers, however, will contribute significant amounts indirectly, as high-volume purchasers of telecommunications...") (*"Second Report to Congress"*).

[17] *Second Report to Congress* at ¶ 22.

[18] For example, Verizon states that removing DSL revenues from universal service assessments, combined with an increase in the wireless safe harbor and a collect and remit approach, would have a nominal impact on the size of the

growth of the universal scrvice fund is alarming and is inflating costs for all parts of the industry. This is of particular concern now as the industry is facing a critical economic challenge. According 10 the FCC *Staff Study*, the current fund is over $6 billion and will increase to over $7 billion in 2007, even though two parts of the fund, the schools and libraries program and the nonrural high cost fund, are capped." Merely expanding the contribution base will not address the need to manage the fund in an cfficient and competitively neutral manner since none of the contribution methodologies under consideration will guarantee an infinite amount of support

The long-tenn viability of the universal service fund will continue to be an issue unless the Coniniission begins to consider ways to meet the statutory principles yet responsibly contain and nianage ihe future growth of the fund. Without effective management, incentives to avoid such costs and/or to game the system will undcmiine the sustainability ofthe fund. In addition, the Commission must ensure that recipients are using support in an efficient and cost-effective manner. In reccnt tcsiiinony before the Senate Conimerce Subcommittee on Communications witnesses alleged that universal service support is being used by carriers for the purpose of gaining andlor maintaining a competitive advantage and not for providing affordable services to all Americans.[20] In fact, the FCC and otliers are currently investigating charges of fraud and

---

fund and would, in fact, result in a decrc-asc in the contribution factor under a revenue-based approach. ***See*** Ex Parte letter from W. Scott Randolph, Director -- Regulatory Affairs, Veriron Communications to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission. tiled September 23, 2002.

[19] "Commission Seeks Conuncnt on Staff Study Regarding Alternative Contribution Methodologies," Public Notice, FCC 03-31 (ref. Feb. 26, 2003) at 5. *The Universal* Service *Administrative* Company recently estimaled that demand for the schools and libraries program in funding year 2003 will be about $1 billion lower than in **funding** year 2002. Demand for *internal* connections and *telecommunications* services has decreased while demand for Internet access has increased. *See* Lener from George McDonald, Universal Service Administrative Company ***to*** **Mr.** William Maher, Chief, Wireline Cornpetition *Bureau, Federal* Conununications Commission filed **April** 3, *2003.*

[20] Compare, for example, written testimony of Mr. Carson Hughes, Telepax, Inc. and testimony of Mr. Matthew Dosch, Comporium Communications before Senate Committee on Commerce, Science and Transportation Subcommittee on Communications, submitted April 2, 2003

abuse in the schools and libraries program.[21] Before entertaining suggestions about expanding thc contribution base, the Commission must ensure that its universal service policies encourage the development of lower cost technologies and economic pricing of telecommunications services with (lie goal of reducing the amount ofsupport necessary over time and are lawfully administered

111. THE COMMISSION SHOULD MAINTAIN THE PASS-THROUGH LIMITS IF A NEW CONTRIBUTION METHODOLOGY IS ADOPTED

Tn its *Report and Order*, llic Commission concluded that, beginning April 1, 2003, the Federal universal service line item charge must be limited to the amount of the contribution factor, may not include a mark-up to recover associated administrative costs, and must be recovered through a separate linc item on the bill.[22] AOL Time Warner strongly supports these steps and urges the Commission lo continue lo require carriers to limit pass-through charges to customers to the amount of the contribution if **a** new contribution ineihodology is adopted. **As** the Commission con-cctly found, limiting the pass-through charges has many public interest benefits, including fostering billing transparency and decreasing customer confusion regarding the amount *of* universal service contributions that are passed through by carriers. Such benefits should be maintained regardless of the contribution methodology utilized for universal service.

IV. CONCLUSION

As set forth above, AOL Time Wanicr urges the Commission to consider carefully the full impact of the pioposed contribution mcthodologics on the Internet and high capacity services, bearing in mind that the growth ofthe fund must be carefully managed to ensure that

[21] ***See*** "*Commissioner Abcrnathy* Announces Public Forum on Improving Administration of E-Rate Program," Federal Communications Commission New Release (rel. Mar. 18, 2003).

[22] *Second Further Notice* at ¶¶ **45-61**

universal service is administered in a manner that is fair and equitable to both carriers and customers of Iclcconimunications and telecommunications services.

Respectfully submitted,

Linda L. Kent

Steven N. Tcplitz
Vice President and Associate
General Counsel
AOL Time Warner Inc.
800 Connecticut Avenue, N.W
Suite 200
Washington, D.C. 20006

Donna N. Lampert
Linda L. Kent
Lampert & O'Connor, P.C.
1750 K *Street*, N.W.
Suite 600
Washington, D.C. 20006
Counsel for AOL Time Warner Inc.

April 18,2003